McDonnell Douglas Corporation *and* Robert H. Mourning. Case 31-CA-1435

15 June 1984

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 12 October 1983 Administrative Law Judge Russell L. Stevens issued the attached supplemental decision. All parties have filed exceptions and supporting briefs. The Charging Party and the Respondent each filed answering briefs to their opponents' cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order.[3]

[1] The judge ruled inadmissible G.C. Exh. 11 which is a position statement submitted by the Respondent in connection with the 1978 Board proceedings in this case. We reverse the judge's rulings in this regard and admit G.C. Exh. 11. In doing so, we find no prejudicial error was committed by the judge in excluding this exhibit since the judge fully analyzed the exhibit on the grounds for which it had been offered and because this exhibit was already a part of the official record in this case permitting administrative notice if so desired.

[2] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We do correct the following inadvertent errors of the judge which do not affect our agreement with his decision. In his decision at fn. 1, the judge mistakenly refers to the company merger as having occurred "after" instead of correctly "before" Mourning's discharge. In his decision at fn. 58, the judge mischaracterized the health condition of Mourning's son. We have ignored that mischaracterization.

[3] We reject all arguments raised by the Respondent in its attempt to eliminate any backpay due Mourning. In particular, for the backpay period found by the judge, the Respondent urged complete disqualification of Mourning on the basis that this case's litigation history created a "special circumstances" exception to toll Mourning's backpay. The Respondent claimed that the Board's 1978 decision in this case represented an abrogation of existing Board precedent which adversely affected the Respondent. We reject the Respondent's claim, noting that the 1978 decision was not a change in Board precedent but merely a factual reevaluation of the record as a result of the intervening court appeal, necessitating a result different from the Board's 1975 decision in this case. We further find nothing so unusual in the protracted litigation of this case so as to deprive Mourning of his entitlement to backpay. Another defense raised by the Respondent is that Mourning purportedly gave false and evasive testimony and tried to limit his interim earnings after the third quarter of 1971 which behavior amounted to an attack on the Board's processes. We find this argument to be groundless in light of the record. The few instances where the judge has not fully credited Mourning and Mourning's efforts in seeking interim employment after the third quarter of 1971 is not the sort of employee behavior where backpay has been denied in the past by the Board. Cf. *M. J. McCarthy Motor Sales Co.*, 147 NLRB 605 (1964); *Robinson Freight Lines*, 129 NLRB 1040 (1960); *Great Plains Beef Co.*, 255 NLRB 1410 (1981).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, McDonnell Douglas Corporation, Long Beach, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative Law Judge. Robert H. Mourning was hired by Douglas Aircraft Company (Douglas)[1] on September 14, 1965, as a flight test service engineer. On January 10, 1966, Mourning was transferred to Douglas' pilot department, initially as a reserve pilot but later reclassified as a transport pilot. In late 1968 Mourning became involved in the efforts of the Air Line Pilots Association (ALPA) to organize Douglas' pilots. On November 15, 1968, Mourning was discharged by Douglas. In May 1969 Mourning filed an unfair labor practice charge with the National Labor Relations Board (Board), alleging that he had been discriminatorily discharged by Douglas because of his union activity. On August 7, 1969, the Regional Director for the Board's Region 20 notified the parties that he refused to issue a complaint in the matter, primarily because of doubt that Douglas had knowledge of Mourning's union activity.[2] On September 2, 1969, Mourning's attorney filed an appeal with the General Counsel's Office of Appeals, challenging the Regional Director's refusal to issue a complaint. On September 22, 1969, the Director of the Office of Appeals notified the parties that the appeal was denied, because of lack of evidence that Douglas had knowledge of Mourning's union activity prior to his discharge. On January 14, 1970, Mourning wrote a personal letter to the chief of the Office of Appeals, accused board officials of incompetence and lawlessness, and stated that he would ask for criminal indictments of Board officials. By reply letter dated January 22, 1970, the director, Office of Appeals, advised Mourning that his letter of January 14 was considered as a request for reconsideration, which was denied on being untimely. On March 11, 1970, Mourning's attorney wrote to the Board and asked that the case be reopened on the basis of newly discovered evidence showing Douglas' knowledge of Mourning's union activity prior to the latter's discharge. That evidence was sent to the Board. By letter dated June 5, 1970, the director, Office of Appeals, denied what it described as Mourning's second request for reconsideration, on the authority of *Forrest Industries*[3] relating to exhaustion of legal remedies. The direc-

[1] Douglas Aircraft Company merged with McDonnell Aircraft Company after Mourning was discharged by Douglas. Respondent is the merged organization; Douglas retained its personnel and corporate structure after the merger, and operates as a division of Respondent.

[2] This doubt subsequently was removed, based on discovery that Douglas did, in fact, know of Mourning's union activity prior to the discharge, whereupon a complaint issued, as discussed infra.

[3] *Forrest Industries*, 168 NLRB 732 (1967).

tor stated, "In the circumstances we must consider this case closed." Mourning and his attorney continued to urge the Board to act in the case and, after more than 2 years, on October 4, 1972, the General Counsel vacated the denial of Mourning's appeal and ordered issuance of a complaint, which was issued November 16, 1972. Douglas timely filed an answer to the complaint and on November 22, 1972, filed a motion to dismiss, citing *Forrest Industries* as authority. Douglas' motion was denied by the Associate Chief Administrative Law Judge on November 30, 1972, but later was granted by the Board, on March 8, 1983.[4] On June 27, 1973, Mourning's attorney filed an appeal with the U.S. Court of Appeals for the District of Columbia. On October 16, 1973, the Court of Appeals ruled in favor of Mourning, and remanded the case to the Board for further proceedings.[5]

Pursuant to the remand, a complaint was issued and a trial was conducted before Administrative Law Judge Richard J. Boyce on March 18–20, 1975. On December 16, 1975, the Board adopted Judge Boyce's recommended decision that the complaint be dismissed on the basis that Mourning was a supervisor as that term is defined in the National Labor Relations Act (Act).[6] On December 22, 1975, Mourning's attorney petitioned the Court of Appeals for the District of Columbia to set aside the Board's Order, and on May 13, 1977, that court remanded the case to the Board for clarification of two supervisory issues raised by Mourning.[7] In a Supplemental Decision and Order dated September 29, 1978, acting on the remand, the Board held that Mourning was not a supervisor as that term is defined in the Act, and without further proceedings before an administrative law judge, held on the merits of the case that Mourning had been discharged in violation of the Act.[8] On October 20, 1978, Douglas petitioned the Court of Appeals for the Ninth Circuit to set aside the Supplemental Decision and Order of the Board. The matter was transferred to the Court of Appeals for the District of Columbia on motion of the General Counsel, which court on August 30, 1979, dismissed the case as moot, and on September 18, 1979, transferred back to the Ninth Circuit.

On March 12, 1981, the Court of Appeals for the Ninth Circuit issued its opinion upholding the Board's Decision and Order dated September 29, 1978, and ordered enforcement of the Order.[9] Douglas' petition for rehearing was denied on December 12, 1981, and its petition to the United States Supreme Court for writ of certiorari was denied on March 22, 1982.[10]

On November 4, 1982, the Board issued a backpay specification and notice of hearing, on which the parties were heard in Los Angeles, California, on April 19–22 and May 2–4 and in Denver, Colorado, on May 17–18, 1983.

All parties were afforded full opportunity to appear, to examine and cross-examine witnesses, to argue orally, and to submit written briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel, Respondent, and Charging Party Mourning.

On the entire record, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. PHASEOUT OF THE BUSINESS FLEET[11]

Douglas Aircraft Company builds passenger jet aircraft for commercial and military customers.[12] Production of DC-8 and DC-9 aircraft commenced in 1965, and production of DC-10 aircraft commenced in 1961.[13] Prior to production the Company was engaged several years in design, development, and testing of those airplanes. Douglas' production facilities were located in Long Beach, California, and the Company maintained support, testing, and other facilities at several outlying locations in the southern California area.

In 1968 Douglas employed approximately 50 pilots who were assigned primarily to three types of flying duty. Those types were engineering testing; checking air fitness of, and training of, customer airline pilots to fly Douglas aircraft sold to customers;[14] and flying planes of the business fleet. All pilots were under the supervision of John Londelius, vice president of flight and laboratory development. Londelius supervised a broad range of activities which generally were assigned to sections or departments, the principal of which were engineering laboratories, experimental flight testing, customer airline training, aircraft delivery, and accident investigation. The immediate supervisor of all pilots was A. G. Heimerdinger,[15] who reported directly to Londelius. Engineering flight test pilots were supervised by George Jansen. Production aircraft test pilots were supervised by Warrant Ewert. Customer airline training pilots were supervised by David Wiebracht. Business fleet pilots were supervised by O. T. Quinn.[16]

Engineering test pilots flew experimental aircraft designed for later production, testing the aerodynamics, stability, and performance of the new aircraft. Those pilots had extensive flight experience, background, and education, and often were graduates of military test pilot schools. There is no dispute about the fact that Mourn-

[4] *Douglas Aircraft Co.*, 202 NLRB 305 (1973).

[5] *Mourning v. NLRB*, 505 F.2d 421 (D.C. Cir. 1974).

[6] *Douglas Aircraft Co.*, 221 NLRB 1180 (1975). Mourning's request for oral argument to the Board was denied in this case.

[7] *Mourning v. NLRB*, 559 F.2d 768 (1977).

[8] *Douglas Aircraft Co.*, 238 NLRB 668 (1978).

[9] *McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932 (9th Cir. 1981).

[10] 455 U.S. 1017 (1982).

[11] This group of aircraft variously is referred to as the business fleet, the little fleet, and the executive fleet. All three terms commonly were used at Douglas at times relevant herein.

[12] Douglas' plant at Palmdale, California, frequently is referred to in the transcript and record. However, production is limited at that plant to military aircraft, and the references are irrelevant to these proceedings.

[13] DC-8s, 9s, and 10s are "heavy" aircraft which fly at altitudes of 30,000 feet and above. Their pilots-in-command require greater experience and qualifications than do pilots of "light" aircraft. The distinction between heavy and light aircraft is not precisely defined, but it is clear that all aircraft used in Douglas' business fleet, and aircraft of similar or lesser size and versatility, are light aircraft.

[14] This second group of pilots usually is referred to as production and delivery pilots. Some of them are designated as training pilots, if their function primarily is to train customer airline pilots.

[15] Heimerdinger is deceased.

[16] Ewert and Quinn are deceased.

ing was not, at any time relevant herein or within the ambit of this controversy, qualified or possibly destined to be, an engineering test pilot. Mourning testified that he aspired to be, ultimately, a test pilot, but that position is at the top of the pilot profession. Because of the gap between Mourning's background, experience, and age, and those of test pilots, the possibility of Mourning's attainment of what he said was his ultimate goal is not considered to be relevant to my issue herein.

Production aircraft first were checked on the ground after manufacture, then were tested in the air by production and delivery pilots. On the first test flights, the only persons aboard were the pilot, copilot, and someone to take notes. On later test flights the pilot commanded a crew of technicians and engineers to evaluate the aircraft and initiate corrective measures that may be required. Production and delivery pilots were responsible for selecting, briefing, supervising, and debriefing after flight all crewmembers. After aircraft were approved for delivery, training pilots instructed and trained customer pilots in the operation of the aircraft. Respondent did not have facilities or programs to teach anyone to fly aircraft—their instruction was limited to introducing experienced airline pilots to the aircraft being delivered. Douglas operated a ground school to train airline customer pilots in operation of DC-8s and DC-9s (and later, DC-10s), but some of Douglas' employees attended the school, or some parts of it, as required or as they wanted, on obtaining permission of their supervisors. Such attendance was on an "audit" basis, i.e., the pilots sat in on the instruction without actually taking part in it. Customer airlines have their own training and ground schools, which they operate for their own purposes. Douglas' ground school was designed to acquaint customer airline pilots with the flight characteristics of particular types of aircraft. Those pilots then would return to their airline, where they would instruct other pilots and appropriate personnel in the aircraft characteristics they learned at Douglas' school.

The business fleet and its pilots were not directly involved in the testing, production, or delivery of aircraft, or in training customer pilots to operate those planes. The business fleet was a service organization, structured but little, and used primarily as a messenger device to transport personnel, parts, and materials among various production and testing facilities in the southern California area. Aircraft used by the business fleet reflects that function—they were light planes and helicopters, used as required by their service duties. The nature of the fleet's function is indicated by the fact, discussed infra, that the fleet ultimately was eliminated, and replaced by leased aircraft and hired contractors. The nature of the fleet was emphasized in cases discussed more in detail infra, wherein the Board and circuit courts analyzed and explained the differences between Douglas' business fleet pilots and its other pilots. The loose departmental structure is indicated by the manner in which pilots were used for the business fleet. When the production schedule required, pilots permanently assigned to the fleet sometimes flew as copilots (no rating required) in DC-9s, or performed other piloting chores not requiring rated pilots. When production was not high or the fleet's service was in high demand, or when occasions otherwise required (such as the necessity for company orientation), engineering test and production and delivery pilots sometimes flew business fleet aircraft on temporary assignment. Helicopter pilots dual-rated in fixed wing aircraft sometimes flew business fleet aircraft, when required. However, business fleet pilots could not fly as pilot-in-command of Douglas' production jet aircraft, unless they were rated to do so.[17] When they were so rated, they were transferred into the appropriate department outside the business fleet.

Douglas' business was the development and production of heavy aircraft, and that business required the use of trained and experienced pilots. As noted above, engineering test pilots and production and delivery pilots were on the front line, so to speak. The safety of persons riding that aircraft for whatever purpose and the safety of the aircraft were of first importance. Test and production and delivery pilots carefully were selected for their jobs, and selection depended to a large degree on the past training and experience of those pilots. As noted, Douglas did not teach people to fly—because of economic and other practical reasons, the Company sought out seasoned pilots to whom they could entrust the lives of others, and the machines they flew. The duties of those pilots were demanding, and were not lightly given or assumed. Those facts repeatedly and convincingly were attested at trial by Respondent's witnesses, and that testimony was supported by Mourning on several occasions.

At the time Mourning was transferred into the business fleet as a pilot, his experience was limited to light aircraft. He had no experience flying DC-8s or DC-9s or any other heavy aircraft. As of February 25, 1965, according to Mourning's pilot logbook, he had flight time as pilot-in-command, totaling 1,237.39 hours.[18] That experience principally was obtained while flying single-engine airplanes, although he had some two-engine flight time transporting passengers for small airlines. His first flight was in 1957, and thereafter he flew for his own pleasure and experience, in evenings and on weekends. He was licensed as a commercial pilot in 1960, and received an instructor's rating and a multiengine rating that same year. He received an Air Transport Rating (ATR) in February 1965. At various times Mourning was a flight instructor, a search pilot for the Civil Air Patrol, a charter flight pilot, and an ambulance flight pilot. Mourning had a high school education, naval enlisted training as a radioman and electronics technician, and a senior engineering certificate (attended school, partially by extension, 3 years) obtained at the University of Minnesota. He also had obtained course credits, mostly in engineering and electronics, at other schools. Mourning

[17] Pilot-in-command operation of heavy aircraft can be undertaken only after type rating required by FAA regulations.

[18] In his application at Douglas for a pilot's position, submitted to Respondent October 18, 1965, Mourning stated that he had 4675 hours' experience as pilot-in-command. Mourning's explanation at trial of the discrepancy between his logbook and his application was not convincing, and is not credited. It is further noted that Mourning represented on May 29, 1968, that he had 4600 hours of flight time, yet as of that date he had flown approximately 3713 hours for Douglas.

had held several jobs over the years, generally of an engineering or electronics nature. He worked for Respondent from December 1963 to February 1965, during the latter portion as a senior engineer, instrumentation, at a salary of $203 per week. From February 1965 until he again went to work for Respondent in September 1964, Mourning flew light aircraft as a pilot for small airlines. After he was transferred by Douglas to a pilot position, Mourning transported personnel, parts, and materials among Respondent's Long Beach and various outlying facilities, initially flying them in small Aerocommanders, of which Respondent had three, and a DC-3, all of which were twin-engined. Mourning was rated by Respondent as a reserve pilot until January 1967, when he was rated by Respondent as a transport pilot. Douglas obtained a twin-engine Jet Commander in 1966, and purchased two twin-engine Cessna aircraft in 1967 and 1968 to replace the three Aerocommanders. By late 1968 Mourning was piloting the two Cessnas and, on some occasions totaling 38.2 hours, had piloted the Jet Commander, which required a copilot. Mourning had been rated to fly the Jet Commander on August 6, 1968, approximately 3 months before he was discharged, and by the time he was discharged, had flown as copilot of the Jet Commander 256 hours. Neither the Cessnas nor the Aerocommanders required copilots. During his employment by Respondent Mourning did satisfactory work, and Heimerdinger recommended a merit increase in pay for him, effective October 28, 1968, which was 18 days before Mourning's discharge. Mouring never was rated to pilot a DC-9, but he did make a few flights on that aircraft, as a copilot and as an observer.[19]

Peak delivery years for DC-8 aircraft were 1968 and 1969, when 102 and 85 aircraft, respectively, were delivered. Delivery of DC-9s attained a later peak, as shown by delivery schedules in evidence. Deliveries were: 5 in 1965, 69 in 1966, 155 in 1967, 200 in 1968, 122 in 1969, and 51 in 1970. Later deliveries were approximately 22 to 50 per year. During peak production periods, business fleet pilots sometimes were used as observers or copilots for production and delivery purposes, but they were on temporary assignments in those capacities; they were not transferred or assigned permanently to production and delivery. By 1969, the necessity of such temporary assignments had lessened. Reduced deliveries of DC-8s and DC-9s are reflected in the reduction of Douglas' personnel. Douglas had 57,688 employees at the end of 1967, which number dropped gradually to 19,231 by the end of 1975. The greatest reduction years were 1969 and 1970, with approximately 8000 employees being laid off or retired in each of those years. Reductions occurred "across the board," including blue collar employees, salaried employees, executives, and pilots. In 1970 Londelius and Heimerdinger discussed the necessity of phasing out the business fleet, as a part of Respondent's overall attrition and its attendant fiscal problems.[20] In June 1970 the Jet Commander, one Cessna, and one helicopter were disposed of, leaving for the business fleet one Cessna and one helicopter. The last Cessna was sold in April 1973, and the last helicopter was sold in January 1974. Thereafter, the work formerly done by the business fleet principally was done by contract with outside firms and, on occasion, with the use of aircraft leased from outside companies. Counsel for the General Counsel and Mourning argue that the function of the business fleet, i.e., its passenger and cargo transport duties, remained, but that is beside the point. The business fleet's personnel and equipment were gone, for legitimate reasons. That fact clearly is shown by *Douglas Aircraft Co*, 207 NLRB 682 (1973), wherein it is stated:

> The Employer is engaged in the production of commercial and military aircraft in Long Beach, California. It has about 35 pilots and 16 flight engineers employed in the flight operations department, the department which is responsible for the engineering testing and test flight programs. These programs entail: (1) basic engineering testing and flight testing prior to sale; (2) crew training for the customer's pilots; (3) final testing and delivery after sale to customers; and (4) the revisit program after sale to assist customers, to observe customer's crew performance, to further train customer-crews, and to trouble-shoot. The pilots are classified as transport pilot, engineering test pilot, and production and delivery pilot. They are licensed and certified by the Federal Aviation Agency (FAA) and they are rotated among the various flight programs described above, as needed. All pilots serve some of their time as captains, at which time they are responsible for, and in complete control of, the plane and all persons on board, and this is the basis for their alleged supervisory status.

Mourning contends that he would have become qualified for at least one of the positions described above, after the date of his discharge had he not been discharged. Respondent contends that Mourning would have been laid off June 9, 1970, when all but one of the business fleet's fixed-wing aircraft were disposed of.

II. EFFECT OF PHASEOUT OF THE BUSINESS FLEET

A. *Initial Legal Question*

Counsel for Mourning argues that Respondent cannot rely on evidence relating to the effect of the phaseout, because of the principles of res judicata and collateral estoppel. That argument is based on the fact that Respondent did not show, during the 1978 trial conducted by an administrative law judge, that the business fleet had been discontinued, and on the additional fact that, in 1981, the Court of Appeals for the Ninth Circuit ordered enforcement of the Board's 1978 Order.

Res judicata dictates that a final judgment on the merits will bar future claims by parties or their privies based on the same cause of action.[21] Some commenta-

[19] No FAA rating is required for the positions of copilot or observer.

[20] The fact that Respondent's decision to reduce the size of, and later eliminate, the business fleet was dictated solely by economic considerations, unrelated to any labor question, is not in dispute.

[21] *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955).

tors denote this doctrine as "claim preclusion." The effect is to foreclose litigation of matters "that never have been litigated, because of the determination that they should have been advanced in an earlier suit."[22]

Collateral estoppel precludes litigation of an issue based on a different cause of action in a second action, if that issue was litigated in, and necessary to, the decision in the first action.[23] This also is known as the rule of issue preclusion. There are exceptions to the rule, including cases where "a new determination may be needed because of considerations of the public interest."[24]

Section 10(c) of the Act empowers the Board to remedy unfair labor practices by taking "such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of the Act." The normal remedy for unlawful termination is reinstatement with backpay, subject to the proviso that such remedies "effectuate the policies of the Act."[25] However, "remedies that award employees more than they would have obtained but for the violations are punitive, not compensatory, and thus improper."[26] The remedy acts to protect public interest.[27] Specifically, the Board's "primary function under Sec. 10 in connection with which it makes specific monetary awards for specific employees, is to prevent the conduct defined as unfair labor practices in Sec. 8."[28]

National Labor Relations Board Rules and Regulations, Section 102.52, provide for a procedure to determine the amount of backpay when the parties fail to resolve the issue. Such a hearing is held after the Board's order directing payment, or the entry of a court decree enforcing the Board's order. The instant backpay specification hearing followed the Ninth Circuit's enforcement decree.

Ordinary practice is first to determine whether or not the discharge was wrongful, and only after this order becomes final is consideration given to the appropriate amount of backpay. The two-stage procedure avoids unnecessary efforts if enforcement is denied. The procedure's propriety is well settled.[29] As the court stated in *Nickey Chevrolet Sales*, supra, 493 F.2d at 106:

> Courts have approved this procedure on the theory that the order of the Board requiring reinstatement and back pay clearly contemplates further administrative determination on its part; that the initial order is analogous to an interlocutory judgment fixing liability but not determining damages; and that the enforcement decree is analogous to an affirmance of such interlocutory judgment on appeal. After enforcement, the prior administrative proceedings resume and the exact amount of back pay due is determined.

In *NLRB v. New York Merchandise Co.*, 134 F.2d 949 (2d Cir. 1943),[30] an employer discriminatorily discharged an employee on July 11, 1941, and was ordered by the Board to reinstate the employee with backpay. The order was issued June 14, 1942. At the subsequent court enforcement proceeding the employer urged that the proceeding be remanded and the Board be compelled to hear the employer's evidence that the employee's position ceased to exist on November 22, 1941. The court refused to remand the case to the Board for further consideration. In discussing the remedy, Judge Learned Hand stated, "It leaves for future decision whether if the employee had not been discharged, he would have kept his job to the date of the order; or if not till then, how long he would have kept it." Id. at 952.

Job availability evidence generally is not heard until the compliance stage of the proceedings. Determination of whether "a substantially equivalent" position is available is ordinarily left to the compliance stage of Board proceedings.[31] Similarly, in *Kuno Steel Products*, 252 NLRB 904, 905 fn. 4 (1980), the Board stated:

> Our Order, of course, does not require Achilles to create new jobs for the discriminatees or pay them backpay for periods when employment was not available at Achilles' plant. Achilles will be permitted to introduce evidence in the compliance stage of this proceeding concerning the existence of jobs for unreinstated strikers at all material times herein.[32]

The Board and Ninth Circuit decisions determined only that Mourning was discriminatorily discharged in 1968. As the foregoing case law reveals, the amount of backpay owed and the subsequent availability of work are matters to be determined at the backpay hearing. Thus, the doctrine of res judicata does not bar evidence of job availability at the compliance stage.

Nor do principles of collateral estoppel apply. The Board determined that Mourning was not a supervisor in 1968, and thus was entitled to the protection of the Act. That decision was affirmed by the Ninth Circuit. Respondent argued that Mourning was a supervisory trainee, and as such would progress in Douglas' flight operations. Based on that contention, Mourning asserts that the issue of job availability actually was litigated, and necessary to the outcome of the decision.

The Board did address the supervisory trainee issue, when it discussed whether or not Mourning's attendance at ground school constituted a supervisory training pro-

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[22] C. A. Wright, *Law of Federal Courts*, 679 (4th ed. 1983).

[23] *Parklane Hosiery v. Shore*, 439 U.S. 322, 326 (1979).

[24] C. A. Wright, *Law of Federal Courts*, 684 (4th ed. 1983), citing Restatement 2d, *Judgments*, § 28(5) (1982).

[25] *Golden Day Schools v. NLRB*, 644 F.2d 834, 840 (9th Cir. 1981).

[26] *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 602 (9th Cir. 1979).

[27] *Golden Days Schools v. NLRB*, supra. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 192–193 (1941).

[28] *NLRB v. Deena Artware*, 361 U.S. 398 (1960).

[29] *NLRB v. Nickey Chevrolet Sales*, 493 F.2d 103, 106 (7th Cir. 1974); *NLRB v. Deena Artware*, supra at 411.

[30] This case subsequently was overruled to the extent that it holds that the Board's order of backpay and reinstatement was insufficient to sustain a finding of contempt. *NLRB v. Deena Artware*, 361 U.S. 398, 410 fn. 2 (1960).

[31] *NLRB v. Retail Clerks Local 876*, 570 F.2d 486, 593 fn. 9 (6th Cir. 1978), citing with approval *North Valley Lumber Sales*, 229 NLRB 1209 (1977).

[32] See also *Goldblatt Bros.*, 135 NLRB 153 (1962). Indeed, such evidence normally would not be admitted at the unfair labor practice hearing. *Bacchus Wine Cooperative*, 251 NLRB 1552 (1980).

gram. The Board held it did not, since "there is no evidence that the program was designed to train pilots to become supervisors. Furthermore, before Mourning could expect assignment as a pilot-in-command on larger aircraft, such assignment was contingent upon his demonstrating his qualifications therefor."[33] The Board characterized any decision on the latter point as speculative. Clearly, that stage of the proceeding decided only the threshold question of whether or not Mourning was protected by the Act. Evidence regarding Mourning's qualifications, in light of the 1970 layoff, now is necessary to reach a decision as to the appropriate amount of backpay, and reinstatement rights, giving consideration to events subsequent to the 1968 discharge. Such evidence was not necessary to determine Mourning's employment status under the Act in 1968.

Finally, even if principles of collateral estoppel were operative here, public policy would dictate that Respondent's evidence be heard. Requiring an employer to reinstate an employee to a nonexistent position is a punitive remedy and would not "effectuate the purposes of the Act." Public policy exceptions to the doctrine of issue preclusion are recognized by Restatement 2d, *Judgments* 28(5), 1982. Whether or not Mourning would have been promoted to production and delivery pilot, a supervisory position, is discussed infra.

B. *Practical Effect of the Phaseout*

Generally, an employee who has been discriminatorily discharged by his employer is entitled to reinstatement to his former job or, if that job is not available, to an equivalent job. That right was accorded Mourning by the National Labor Relations Board in its 1978 Order, as enforced in 1981 by the Court of Appeals for the Ninth Circuit.

However, in some situations, legitimate and substantial business reasons may justify an employer in his failure or refusal to reinstate an employee. One such reason may be elimination of the employee's job for substantial and bona fide cause not related to any labor dispute.[34]

As noted supra, the fact that Douglas' executive fleet was reduced, and thereafter discontinued for reasons unrelated to any labor dispute, clearly is shown by the record. Nor does Respondent dispute the fact that it has the burden of proving that Mourning would have been laid off in 1970 solely for economic reasons. The General Counsel and Mourning argue that Mourning's status under reduction and later elimination of Douglas' business fleet is speculative, and that Respondent did not meet its burden of proof. Determining that issue requires review of the facts, including comparison of qualifications of Respondent's pilots.

The General Counsel and Mourning contend that Respondent used the business fleet somewhat as a training ground for pilots, and that pilots normally and habitually moved from the business fleet to production and delivery and even, on occasion, to engineering testing. That contention does not have the support of the record. Although, as earlier noted, there was temporary interchange of pilots among the three groups, and although some pilots destined from the outset to go into testing or production and delivery initially were hired into the business fleet, the fact remains, as the Board and courts made clear in *Douglas Aircraft*, 221 NLRB 1180 (1975), *Mourning v. NLRB*, 559 F.2d 768 (1977), and *Douglas Aircraft Co.*, 238 NLRB 668 (1978), cited supra, that the business fleet was an administrative and operational unit, with its own pilots, separate and apart from engineering testing and production and delivery pilot units. Generally, pilots were hired, and placed in appropriate positions, according to their training, education, and work experience. It is also true that some pilots were "promoted" into testing or production and delivery positions, but that, too, was not the general rule. These matters are discussed infra, in review of pilots employed by Douglas at times relevant herein.

Respondent does not now contest the fact that Mourning illegally was discharged, and that he is entitled to reinstatement and backpay. Respondent argues that the backpay should be discontinued as of the date when Mourning would have been laid off, i.e., on June 9, 1970, solely because his job was eliminated and there was no equivalent job. Much of the argument of the General Counsel and Mourning is addressed to the original wrongdoing by Respondent in discharging Mourning, but that argument is not relevant to this case. Here, the principal question is whether or not Mourning would have survived the 1970 attrition, and the later discontinuance of the business fleet. In order for Respondent to meet its burden of proof, Mourning's failure to survive must be shown with certainty. The showing cannot be based on speculation. At the heart of Mourning's rebuttal to Respondent's basic argument is the contention that, but for his discharge, he would have followed the same route of job progression that others followed, both before and after his discharge, which would have culminated in DC-9 rating and assignment to a job as pilot in production and delivery.[35]

When the decision was made to commence elimination of the business fleet, the fleet's pilots were Quinn, Riley, Campbell, McKenzie, Speakes, West, Mann, and Phillips. The latter four were helicopter pilots.[36] Speakes and West were laid off June 9, 1970, when one of Respondent's two helicopters was disposed of,[37] and Mann and Phillips were laid off in 1974, when the remaining heli-

[33] *Douglas Aircraft Co.*, 238 NLRB 668, 672 fn. 25 (1978).

[34] *Pat Izzi Trucking Co.*, 162 NLRB 242 (1966); *National Freight*, 154 NLRB 621 (1965); *Underwood Machinery Co.*, 95 NLRB 1386 (1951). See also *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (dicta at 379) (1967).

[35] This, of course, would mean a "promotion" from rank-and-file status to that of supervisor. *Douglas Aircraft Co.*, 207 NLRB 682 (1973).

[36] Mourning was not a helicopter pilot, nor does he contend that he was, or wanted to be, such. Therefore, the status of helicopter pilots is not conclusive of any issue herein.

[37] It is quite clear that the experience and the qualifications of Mann and Phillips were superior to those of Speakes and West, and that the helicopter pilots were laid off in conformance with Douglas' criteria which emphasized experience and qualifications, as credibly testified to by Londelius and other witnesses. It is further noted that Speakes also was qualified as a fixed-wing pilot, had far more flight hours than Mourning, had 25 years' military experience, and was better qualified than Mourning.

copter was sold. The training and the experience of Quinn, Riley, Campbell, and McKenzie are as follows:[38]

Quinn was hired in March 1966 as a reserve pilot. He had been trained in the military and had 19 years' experience in the Navy, being discharged as a captain in the Naval Reserves in 1956.[39] Since 1952 he had been working as a transport and test pilot for North American Aviation. He was employed as a flight captain for 6 years by Aero Jet General Corporation, flying Convair 240 and other twin-engine craft. He was employed as a chief pilot and design engineer for C & W Aviation Corporation and as a reserve flight captain for Capitol Airways. At the time of his hire, Quinn had 11,801 hours of flying experience, 10,607 hours of which were in-command hours. His background included both jet and four-engine experience.

Riley was hired in March 1968, initially as a transport pilot. He had extensive military training and experience, having been a pilot in the Air Force for 20 years before retiring with the rank of major. He had 5409 flying hours, 4568 hours of which were in-command hours; his flight time included substantial heavy jet experience as well as four-engine experience. His military experience included several years as a jet fighter pilot and a pilot instructor. He had served overseas as an advisor in Iran. Riley was classified as a production and delivery pilot in 1974.

Campbell was hired in June 1967 as an engineering planner and transferred to the business fleet as a fixed-wing pilot in August 1968. Prior to then he had 2740 flying hours, 1720 of which were helicopter hours obtained during 6 years in the Air Force and 3 years in the Army. His Air Force experience included 17 months' attendance at a fixed-wing flight training course, which Campbell did not complete. At the time of his termination by layoff in June 1970, Campbell had approximately 5000 hours of flying experience. He had a multiengine airline transport pilot rating with an instrument instructor attachment, which permitted him to instruct others as ATR pilots. He attended a full course of DC-9 ground school in October 1969. He had completed 30 credits towards a business administration degree at Troy State University in Alabama.

McKenzie was hired in June 1969 as a business fleet pilot. He joined Douglas on graduating from Purdue University with a BS in aviation. During his time at Purdue he flew 850 hours as a DC-3 copilot for Purdue Airlines. McKenzie attended DC-9 ground school in 1969 while employed by Douglas.

Mourning's qualifications and experience are summarized supra.

[38] This information is taken from evidence in the record, and is summarized in Respondent's brief. The entire record has been carefully reviewed; the information is not challenged and is accepted as accurate.

[39] Throughout trial in the instant case runs a continuous thread clearly showing that Douglas preferred, and consistently sought for its pilot corps, experienced military pilots. Respondent's witnesses credibly testified to that fact, and explained that a principal reason for the preference was that military organizations gave their pilots extensive training of high quality. Further, that training is followed by intensive flight experience. A satisfactory military flight career virtually guaranteed for Douglas a highly qualified pilot for commercial purposes.

Londelius credibly testified, relative to Douglas' determination of layoffs:

> Q. Okay now, did you discuss the criteria for layoff with Mr. Heimerdinger?
>
> A. Yes.
>
> Q. Okay, and did you establish—was it your responsibility to establish the policy with regard to layoff?
>
> A. Yes it was.
>
> Q. Could you explain what criteria were established with regard to layoff?
>
> A. Well we looked—across the board, that people had had the broadest experience. We wanted to keep those people that could be universally used, those people that had dual ratings, those people that had the most experience with airlines or the military and in the case of military production, were kept.
>
> The personnel—we just did not cut from the very bottom. We looked across the board and as to what the future growth potential of the people were. The fundamental policy was to be as efficient as we could and therefore had people that were as versatile as possible, as far as ratings and experience and education is concerned. We certainly looked at the educational background of the individual, in many cases.

It is apparent that had Mourning been employed in the business fleet on June 9, 1970, he would have been selected for layoff. Londelius and other witnesses for Respondent credibly testified that seniority was not a consideration in making the layoffs; that the principal determinants were training and experience. Only two fixed-wing pilots, Quinn and Riley, were retained for the business fleet, and the training and experience of both were superior to those of Mourning. Both had much more command flight time and heavy aircraft flight time than Mourning, and both had extensive military flight experience, which Mourning did not have. Whether Mourning would have been a business fleet pilot in addition to Quinn, Riley, Campbell, and McKenzie, or in the place of McKenzie, who was hired after Mourning was discharged, the result would have been the same.[40]

[40] McKenzie testified:

> Q. Were you laid off from the flight department at some point for lack of work?
>
> A. Yes. And—
>
> Q. When did that happen?
>
> A. I'm guessing, but I think it was like early summer in '70. Like maybe July or something, I believe. I could be wrong on that, but it was around then. I joined East African Airways in November of that year, so I believe it was around June or July.
>
> Q. Now, did Mr. Heimerdinger speak to you with regard to the layoff? Did he tell you you were being laid off?
>
> A. Yes.
>
> Q. Did he tell you why you were being laid off?
>
> A. Because of a general cutback in the whole company.
>
> Q. And were the other pilots laid off at the same time in the flight department?
>
> A. Yes.

McKenzie was hired as a business fleet pilot in June 1969, after graduation from Purdue University with a BS in aviation. While at Purdue he flew 850 hours as a DC-3 copilot for Purdue Airlines. While working for Douglas, he attended DC-9 ground school in 1969. McKenzie had an education that was equal to, or better than, Mourning's so far as Douglas' requirements were concerned, but Mourning's flight time was greater than that of McKenzie, and his work experience was broader. Clearly, under the criteria credibly explained by Londelius and other witnesses for Respondent, Mourning's overall qualifications for Respondent's purposes were better than those of McKenzie, but the fact remains that Quinn and Riley were more highly qualified than Mourning.

More to the point is the case of Campbell, who was hired as an engineering planner in June 1967 and transferred to the little fleet as a fixed-wing pilot in August 1968. Prior to entering the business fleet, Campbell had 2740 flying hours, of which total 1720 hours were in helicopters. Campbell had military flight training and experience and, when he was laid off in June 1970, had 5000 hours of flight experience, which was more than Mourning would have had if he had not been discharged. Mourning and Campbell both testified relative to their comparative experience and qualifications. Mourning stated:

> Q. Mr. Campbell was one of the pilots of the business fleet during the latter part of your employment with the company, was he not?
>
> A. Yes sir.
>
> Q. And did he fly the same kind of assignments that you flew?
>
> A. Yes, with exceptions. He flew the twin-engine Cessnas, he flew as my co-pilot in the Jet Commander when I became rated as a captain and he did not fly any DC-9 production flights.
>
> Q. While your were there?
>
> A. Yes sir.
>
> Q. When you were in the military, you did no flying is that correct?
>
> A. I was not a pilot in the military. I can say that I did fly in the military on a passenger basis. I had intended to become a pilot at one time in the military when I was underage, but it did not work out.

In comparison of the qualifications of himself and Mourning, Campbell stated:

> Q. Wasn't his experience roughly comparable to yours?
>
> A. Let's say we're talking different types of—yes, but mine was military helicopter time and some military jet time and some fixed wing time, and Bob's was almost completely fixed wing time.
>
> And I had been more into the instructing phase than Mr. Mourning had been. He had been more in a commercial phase.
>
> It is comparable, yes, but it's like apples and oranges. I don't mean to obfuscate it, but—

Campbell was laid off at the time Quinn and Riley were retained, and Campbell's experience and qualifications were at least as good as, and appear to be better for Respondent's requirements than, those of Mourning. Certainly Campbell had more diversified experience and qualifications than Mourning, including military experience, and more flight time.[41] In any event, it is quite clear that, regardless of which of the two was better qualified, neither of them was the equal of Quinn or Riley in experience and qualifications. Respondent needed only two fixed-wing pilots, and it kept the best two it had.

C. *Rebuttal by the General Counsel and Mourning's Counsel*

Mourning's initial contention is that the business fleet was only partially discontinued in June 1970, and that Respondent's argument relative to Mourning's layoff cannot apply "if anti-union considerations are at play in the post-discharge events." Counsel argues that Respondent harbored "continuing hostility" toward Mourning and unions, and that it would be naive to suppose that Respondent would not have laid off Mourning in June 1970 because of Mourning's union activity. That argument is not persuasive. The facts that a reduction in the business fleet was necessary solely for legitimate economic reasons and that the reduction was made clearly are established by the record and are not seriously contested. The fact that Quinn and Riley were more qualified for retention than Mourning was, or would have been by June 9, 1970, is apparent, or discussed above. The fact that Mourning was not rated as a DC-9 pilot is not in dispute. Although Quinn and Riley were more experienced and qualified than Mourning, both at the time they were hired and as of June 9, 1970, they still had not been moved to production and delivery to fly DC-9s as pilots in command, as of that date.[42] Had Mourning remained in his job from the date of his discharge until June 9, 1970, his experience and qualifications would have remained in the same relative position with Quinn and Riley. He would have been more experienced, but so would they. Quinn and Riley still had not moved out of the business fleet in June 1970, and there is no reliable evidence in the record to show that Mourning would have moved out ahead of either of them, although there is some testimony on this point. Campbell testified herein:

> Q. Subsequent to that conversation where Mr. Mourning was present, did you have any other conversations where Mr. Quinn indicated what the prospects were for Mr. Mourning to progress?

[41] Counsel for Mourning argues, impliedly, that Campbell was laid off because of his union activity, and not because of the phaseout of the business fleet, but that argument is not supported by the record and is not persuasive. Campbell exhibited on the witness stand a clear and strong bias against Respondent, but he never filed an unfair labor practice charge alleging that he was discriminatorily discharged.

[42] Mourning acknowledged that he was not progressing as fast as he wanted to, and testified that he resented the fact that other pilots were promoted to DC-9 pilot positions before he was.

A. Yes. And, again, it was general conversation, that Riley was being groomed after Mourning. Mourning would probably move up ahead of Riley, the way it had gone. He got his Jet Commander rating, he did a good job on that, and that general conversation, that was the first step to moving on up into the other aircraft as openings occurred.

However, that testimony is contrary to the testimony of Quinn (who is deceased), given in March 1975 (221 NLRB 1180):

Q. Do you have a personal evaluation or personal opinion of him rating as a pilot?

A. Well yes, I have my opinion. I felt that he was a reliable pilot as far as the basis of his experience went, but sometimes I felt that if he operated out of his experience or background he had, he wasn't ready for further advancement.

Q. Did you ever use him as a photography pilot?

A. No.

Q. Did you ever consider it?

A. Yes.

Q. Why didn't you use him?

A. Well, it was beyond his experience.

I might elaborate on that. Usually in photography work you fly very close to the plane that you are photographing, sometimes almost wing-tip to wing-tip, and other times out a little further.

And usually this requires experience in formation flying with a military background, and Bob had not had that military background.

So that's why I say it was beyond his experience.[43]

Based on credibility observations of Campbell, noted above, this testimony by Campbell is given no credence.

Mourning's counsel followed the first argument by proposing that "nondiscriminatory treatment of Mourning would have resulted in the early 1970's, in his transfer to DC-9 production flying . . . ." The General Counsel's brief primarily is addressed to the question of the layoff of June 9, 1970, and the General Counsel states: "There can be no doubt that Mourning would have continued on in the employ of the Respondent in the capacity of a production and delivery pilot" had he remained in Respondent's employ and been treated nondiscriminatorily.[44] Those arguments are speculative, and depend on three basic assumptions: 1. The business fleet was a sort of training ground, or stepping stone, to higher positions in the Company. 2. Respondent regularly and as a matter of practice brought pilots into the business fleet, trained them as necessary, and promoted them to production and delivery pilots. 3. One pilot is much the same as the next pilot, and promotion to a supervisory pilot's position comes along at Douglas as a matter of course. The record does not support those assumptions.

1. As noted supra, Respondent's pilots are placed in three discrete units— testing, production and delivery, and utility (the business fleet). The first two units have pilots of considerable experience and qualifications. Test pilots are at the top of their profession, are specifically trained, and possess the finest piloting and engineering skills. Production and delivery pilots are rated to fly heavy jet aircraft, and obtain their positions through training, experience, and demonstrated skills. The lives of testing and training crews are in their hands, and they are supervisors, not rank-and-file employees.[45] Their selection is a managerial function, not a ministerial one. They do not move into their positions in an automatic or scheduled manner. More is required than merely being rated as a transport pilot, without regard to other factors. As earlier noted, Douglas has no program whereby it trains pilots. It hires pilots, most of whom it places directly in as test or production and delivery pilots. Some may be placed temporarily in the business fleet, but with the intention from the outset of moving them into other jobs as soon as possible.[46] But, the business fleet had a specific function for which it was used, and that function was not the training and education of pilots for future use of them in testing or production and delivery.

2. As earlier discussed, Respondent often transferred pilots in and out of the business fleet on a temporary basis, for business convenience or necessity. However, that fact did not alter the nature of the three pilot departments or their functions. Mourning's counsel named several pilots who had been "promoted" to production and delivery from the business fleet, "immediately preceding 1968." Those named pilots were Battaglia, Brush, Colburn, Freiburger, Gurs, McKee, Quinn, Riley, Torosian, Wiebracht, and Williams. A brief look at those pilots' backgrounds illustrates the difference between their readiness for heavy aircraft command piloting and the readiness of Mourning for that position.

Battaglia had an extensive educational background (MIT) in aeronautical engineering and aerodynamics, and is an engineering test pilot with more than 1500 hours of heavy jet missions in B-47s. Brush had an extensive educational background in aeronautical engineering and naval science (University of Illinois) and now is an engineering test pilot. Colburn is a thoroughly (Navy) trained and experienced pilot with 19,400 hours of flight

[43] Flying photographic missions is one of the jobs of the business fleet.

[44] The backpay specification is based on the assumption that Mourning would have been promoted to DC-9 pilot in 1971. That assumption is based on speculation discussed below, and cannot be adopted.

[45] Each case of allegedly supervisory status must be considered on its merits, of course. As pointed out by Mourning's counsel, production and delivery pilots may not be supervisors at all times. However, it is clear that all production and delivery pilots may at any time, because of the nature of their assignments, be placed in the position of supervisor. In any event, as discussed supra, Douglas' production and delivery pilots were established as supervisors by the Board and the Circuit Court for the District of Columbia.

[46] Daniel Colburn, whose extensive qualifications and experience are discussed infra, testified at some length concerning the manner in which he was hired into the business fleet, and his subsequent move into production and delivery, gradually at first and later full time. It is apparent that his background made him an ideal candidate for a pilot's position in production and delivery. His first flight as captain of a DC-9 was on June 21, 1966, and his last flight in the business fleet was in September 1968. He was particularly suited for training pilots, in which capacity he was used by Douglas. When he was hired, he was specifically told that he would be transferred into a DC-9 pilot position. His situation as a pilot was quite different from that of Mourning.

time logged in the military with commercial airlines, and with private business organizations. He was a pilot inspector for FAA for 4 years. Freiburger served 23 years in the U.S. Air Force, and when he was hired by Douglas in June 1965, had 9145 hours of flight time, of which 7079 was as pilot in command, and 2000 was in command of C-54 (heavy) aircraft (four engine). Gurs has a BS degree in aeronautical engineering (Sussex College, England), has a BA degree in Russian language,[47] and at date of hire had 3060 hours of flying time, with 2658 of them in command of (heavy) DC-8s. McKee came to Douglas in March 1965 as a reserve pilot,[48] and at that time had 16,000 hours of flying time, of which 15,200 were as pilot-in-command, and 3000 were in four-engine (heavy) aircraft. McKee has a BS degree in aeronautical engineering (University of Illinois) and a masters degree in aerospace operations management (University of Southern California). He has extensive experience in military and civilian command flight. Quinn had extensive heavy military and civilian flight experience, as discussed earlier. At the time he was hired in 1966 as a reserve pilot, he had 11,801 hours of flight time, which included 10,607 hours as pilot-in-command of both light and heavy jet aircraft. Riley also had extensive experience, as discussed above, with 4568 hours of in-command flight, including light (jet fighter and instructor) and heavy aircraft.[49] Torosian had an impressive background. He has a BS degree in aeronautical engineering (University of Illinois), and a masters degree from the California Institute of Technology. He had extensive flight experience, including that of bomber commander, and extensive military education in test piloting and aerospace research. Wiebracht presently is chief pilot for Douglas, and has extensive military experience and training. While in the Navy, he piloted multiengine PBM-5 aircraft for 2 years. He worked 10 years as a DC-3 and DC-4 pilot in the Middle East. Williams was qualified both as a flight engineer and pilot, and was rated to fly DC-8s and DC-9s. He worked for Douglas as a flight engineer from 1956 until 1966, when he quit to pilot DC-8s. He returned to Douglas within a year, was assigned to the business fleet, and later was transferred to production and delivery. In addition to the foregoing, Mourning listed Conant, Hamlin, and Sanders as his "colleagues," and said that if they were transferred to production and delivery, he would have been transferred also. Conant had extensive military and civilian flight experience, and had been an engineering test pilot for Douglas since 1955. Hamlin was a production and delivery pilot since 1962, and although he flew extensively in the business fleet, he had been rated since 1966 to fly DC-9s. Sanders was a Marine Corps pilot for 22 years, until 1964, and had 7903 flight hours, of which 6730 were in command. He was rated for, and often flew, DC-6s, DC-8s, and 1049 Convair four-engine propeller and jet aircraft.

As a review of those pilots shows, it is apparent their experience and qualifications largely would be wasted if they were assigned permanently to the business fleet to ferry personnel, parts, and materials in the southern California area on short hops of less than an hour.[50] Obviously, they were assigned to the business fleet on an ad hoc basis, or en route to some other assignment where their talents would be used to Douglas' advantage. Review of those pilots' backgrounds also brings into sharp focus the difference between their experience and qualifications and the ones of Mourning.[51] They were heavyweights in the profession, so to speak, and Mourning did not have equivalent qualifications. Therefore, it is not realistic to compare those pilots with Mourning, and assume therefrom that Mourning was an in-house trainee, inevitably destined to move up the ladder to production and testing and do the same job to which those pilots were assigned. It may well be that such a result ultimately would have obtained, but the record does not show that any such plan, generally or as it applied personally to Mourning, was a part of Douglas' operations. Mourning's promotion was not preordained, and there is no reliable evidence that his promotion was promised or assumed by Douglas.

3. As shown above, all pilots are not the same. Some have extensive educational backgrounds in aeronautics and the science of flight, and some have many thousands of flight hours in command of heavy aircraft. Some have both qualifications, and some have neither. Patently, and as Londelius and McInnis made graphically clear, Douglas' fortune in the field of heavy aircraft production dictated the desirability and necessity of having the best pilots they could find. As those two witnesses demonstrated, Douglas liked to promote pilots from within if possible, for obvious reasons, but the system of hiring and retaining on the basis of excellence always *remained* the same. There was no fixed system for bringing in pilots at the bottom, training them, and moving them on to higher positions. When the business fleet was reduced on June 9, 1970, the two least qualified pilots were McKenzie and Campbell, and they were laid off. Mourning's qualifications were approximately the same as those of McKenzie, who was less qualified than Campbell. None of the three approached the qualification plateau of the pilots named by Mourning and his counsel as having moved from the business fleet to testing, or to production and delivery. It is possible, of course, that absent any layoff, Mourning ultimately would have been rated to fly DC-9s and would have been moved to production and delivery,[52] but that is speculative, and further, the

[47] Londelius credibly testified that Russian language ability is of value to Respondent.

[48] Pilots now referred to as transport pilots, formerly were called reserve pilots.

[49] Although Riley was hired in March 1968 as a transport pilot, and had far greater experience than Mourning, he was not made a production and delivery pilot until 1974. Similarly, Quinn, who had much more experience than Riley, was not even moved into production and delivery—he was left in the business fleet, as its director.

[50] The record shows that this is the time involved in most of the business fleet's flights.

[51] George Jansen, Respondent's chief engineering pilot during times relevant herein, testified concerning the qualifications and experience of many of Respondent's pilots in whose hire he participated. His testimony adds emphasis to the record concerning the type of pilot Respondent sought for its testing, and production and delivery, units. The qualifications and experience of all pilots discussed by Jansen were extensive.

[52] It seems quite unlikely that Mourning would have became an engineering test pilot, and he does not advance that argument.

layoff precluded any such action. The layoff was a legitimate, economically dictated move having nothing to do with Mourning's fortunes. Counsel's speculative argument that Douglas so disliked Mourning it would have laid him off discriminatorily in 1970 cannot be the basis for any finding or conclusion. Finally, the matter of time for DC-9 rating must be considered. Even as of June 9, 1970, had Mourning remained in the business fleet he would not have accumulated as much flight experience as other pilots had when they were so rated. Many pilots waited longer than 4 years, and had far greater experience than Mourning would have had after 4 years before they were given a DC-8 or 9 rating.[53]

Mourning argues, however, that regardless of Douglas' usual system of hiring and promoting pilots, he was personally assured, expressly and implicitly, that he would be moved into production and delivery. As evidence of that assurance, Mourning cited several incidents.

a. Mourning testified that, when he was transferred into the business fleet in December 1965, Heimerdinger told him "that they needed pilots and that I would start on the business fleet and that I would be able to fly the DC-9s if the possibility was held out to me . . . ." Mourning said other pilots, including Brush, were told the same thing. At another point in his testimony, Mourning stated that he once talked alone with Heimerdinger in a bar and said "I sure would like to get a chance at the DC-9's myself" to which Heimerdinger replied, "Well, you will get it."

Campbell testified:

> Q. Did you have any discussions with Mr. Quinn or Mr. Heimerdinger at that time or thereafter regarding what you could expect as progression within the flight department?
>
> A. Yes, in a general sense. Obviously, I was on a trial basis. Not exactly on probation, but on a trial basis, and if I worked out in six months I would be definitely considered for moving up into the production flight if they felt I was capable of handling.
>
> They had done this in the past and I guess, in fact, at the time Quinn was being considered for that and so was Chuck Riley, who was another pilot.

McKenzie testified:

> Q. When Mr. Heimerdinger interviewed you, could you tell us what he said at the time of the interview with regard to what you could expect with the company or what the possibilities might be with the company?
>
> A. Well, at the time it was a career job and at the time I hired on there I expected to retire there and to go on and fly the DC12 whenever they built it, or whatever, you know.
>
> Q. What did he say to you with regard to that possibility?
>
> A. Well, it was a definite possibility.

The testimony on this point is of no probative value, for several reasons. First, Heimerdinger is deceased. His testimony was not available. Second, the alleged conversation took place prior to the layoff, which, so far as the record shows, was not anticipated at the time of the conversation. Third, assuming the conversation took place, both Campbell and McKenzie were laid off, regardless of what was said. Finally, all three witnesses spoke only in terms of the possibility that the pilots would move into production and delivery.[54]

b. Mourning testified that he had attended DC-9 ground training school, but only for 1 day, on November 14, 1968, the day prior to his discharge. Mourning also testified that Heimerdinger earlier had authorized his attendance on the 1 day because he was grounded, and he had nothing else to do that day. This testimony is of no probative value, particularly since both Campbell and McKenzie had attended the DC-9 ground school course prior to their layoffs, Campbell for the entire course and McKenzie for part of it.

c. Mourning testified that he spent some time in a DC-9 as an observer:

> A. Well, they issued me all the regalia that goes with a production and delivery pilot, an orange suit, flight boots and in effect, there was I suppose a tacit admission that I was entering the production function.
>
> Q. Well, did you just go one day and decide you were going to observe the function or did—were you assigned to the observation?
>
> A. I was issued all the equipment and I thought I was assigned for observer, but I can't recall now whether it was a general assignment and then the dispatchers handled you or whether it came down from Heimi or how it was handled.

Londelius testified:

> Q. Now, Mr. Mourning testified that when he had flown as an observer on the DC-9, he had received an orange uniform of some type. Could you tell us to whom such clothing was issued?
>
> A. It was issued to all flight personnel on any of the production or test flights and let me tell you the reason for that. We lost an airplane, an A-4D with a pilot by the name of Jimmy Verdon over the Mojave Desert. He bailed out of the airplane and as we found out later he was killed in the bailout. He was still in his seat. It took us over three days to find the body and therefore, at that time, we issued instructions that all personnel whether a full flight suit or a flight jacket should be in international orange so that we could identify them and locate

[53] John Rogers, a very highly qualified and experienced pilot, was hired in 1968 and was told at the time that he would go from the business fleet to production and delivery, yet he did not do so until 18 months later.

[54] It is noted that, during the 1975 hearing, Walter Kent, director of Douglas' business operations in the flight department for 7 years prior to his retirement in 1974, stated that Mourning was not "being qualified, in the process of training [or] attempting to qualify" for production and delivery flying. Kent was not questioned on this subject during the trial herein.

> them if there was an accident. We were doing, of course, experimental flight testing and we had lost aircraft.
>
> So, and this included everyone on board, mechanics, technicians and observers.

Londelius' explanation of this matter is credited, and it is found that issuance of the colored clothing to Mourning did not, expressly or impliedly, infer that he was a production and delivery pilot, or would be promoted to that position.

d. Mourning testified that, in 1966, he was given business cards by Douglas, just as were "a lot" of other pilots that identified him as "Production and Delivery Pilot Aircraft Division." At the time he received the cards, Mourning had been employed by Douglas approximately a year, and obviously was not then, nor could he be for a long time, a production and delivery pilot. Certainly, the cards did not reflect a DC-9 pilot rating, nor did they imply that such a rating, or assignment to production and delivery, would be forthcoming. The reason for the cards being worded the way they were is not shown, nor is it clear whether or not Campbell, McKenzie, West, and Speakes were given similar cards, but in any event, it is clear that the cards did not constitute, or indicate, a contract or a system of pilot promotion. Further, the layoff of June 9, 1970, superseded the situation that prevailed in 1966.

e. Mourning was given merit increases during his employment, including one given shortly prior to his discharge. However, that fact is irrelevant to any issue herein. He was not given any unusual salary or wage increase, and in any event, the nature of his work performance, satisfactory or unsatisfactory, is not in issue. All questions concerning the quality of Mourning's work were disposed of by the Board in 1978, when it was found that his work was satisfactory, and that he had been discriminatorily discharged.

f. Mourning testified that he talked with Quinn on the telephone shortly before Quinn died, and that Quinn was very bitter, and said he was "suing the company." Quinn was not employed by Respondent at that time. Mourning was questioned at length during redirect examination by the General Counsel and on later cross-examination, and his testimony was confusing, inconsistent, and ambiguous. He jumped from subject to subject, and related pieces of several conversations he said he had with Quinn, face to face and on the telephone. He was prompted repeatedly by the General Counsel, and seemed to be recalling several things simultaneously, without remembering details. However, the thread he wove throughout the recitation was Quinn's alleged statements that Mourning was a good pilot who would have advanced with Respondent and who would be piloting DC-10s but for his discharge. That portion of Mourning's testimony was not convincing. It had the appearance of being self-serving and uncertain, particularly since it was contrary to Quinn's testimony in 1975, as noted supra, and to Mourning's own testimony the preceding day, when he stated that he never talked with Quinn about wanting to fly the DC-9, because "That was not his Quinn's domain . . . ." On being pressed by the General Counsel, Mourning stated, "We talked about a lot of things, but I cannot recall a conversation like that, no. Heimi Heimerdinger was the only one . . . director I approached."

The General Counsel and Mourning argue that Respondent has changed its position, and that evidence of Mourning's qualifications as of June 9, 1970, should not be compared with those of other pilots, because of speculation involved in the question of whether or not Mourning would have been retained after the layoff on that date. Counsel continues that argument, and states that, because prior to this backpay proceeding the question of a nondiscriminatory layoff never was raised, it should not now be raised. At trial in this case, the General Counsel offered in evidence what is stated to be Respondent's prior inconsistent position, [55] and the offer was rejected. The General Counsel urged in brief that the ruling be reconsidered and revised. The trial ruling that the evidence be rejected as irrelevant is reaffirmed, but the statement has been reconsidered in light of the argument of counsel. The statement reads as follows:

> Prior to Mourning's discharge from the company, he was actively training for future assignments in respondent's production, delivery and testing functions of flight operations. He was attending DC-9 ground school (the DC-10 was not yet in production), and he was flying as copilot in that aircraft (Tr. 29:4; Tr. 104:12-14; Tr. 377: 16-18; G.C. Exh. 3). Mourning had been trained in jet aircraft and had, in fact, obtained his jet training (ATR) in the Jet Commander (Tr. 63: 4-65:18). He obviously wanted to qualify in the company's jet aircraft and to progress within the flight department (Tr. 377: 2-8; Tr. 63: 16-19); Tr. 102: 16-104:22. He was, at the time of his discharge, preparing for a future in the company's commercial field (Tr. 376:17-24). Mourning's progress toward that ultimate goal, if measured by the normal progress of other pilots in the business fleet-Mourning's contemporaries, and if not disrupted by his own inabilities, was definite and certain, not speculative. Other pilots in that 1967-1968 business fleet went on to become, in the normal course of progress, production and delivery pilots for the company. [Footnote omitted.]
>
> . . . .
>
> . . . pilot and instructor pilot for the company (Tr. 339:3010); Quinn is an engineering field representative (as McKinnon) (Tr.337:19-20). There is no business fleet today (Tr. 339:1-2), it having undergone reductions since June, 1970 (Tr. 206:4-8; Tr. 235: 19-21) and completely phased-out afterwards (Tr. 206:9-25; Tr. 235:17-18).

The statement is not inconsistent with Respondent's present position, since Respondent acknowledges that Mourning wanted to become a production and delivery pilot, and there was a possibility that he would progress toward that goal. However, that statement specifically is

[55] That position was stated in proceedings of *Douglas Aircraft Co.*, 238 NLRB 668 (1978).

addressed to the time "prior to Mourning's discharge from the company . . . ." That time frame, and the time frame from date of discharge to June 9, 1970, is settled. Mourning was found to have been illegally discharged, and entitled to backpay. Respondent does not contend that Mourning is not entitled to backpay prior to June 9, 1970. The layoff of that date was for economic reasons unrelated to Mourning. The question is how that layoff would have affected Mourning, if at all.

It is true that Respondent pressed in earlier proceedings its argument that Mourning was a supervisor, but Administrative Law Judge Boyce and the Board agreed that he was not a supervisor. That argument ultimately was negated by the D.C. Circuit Court, but there is no inconsistency in Respondent now arguing from the legal base built by the court. It is equally true that Mourning once urged that the pilots were organized in three separate units – business fleet, production and delivery, and engineering testing. However, the present emphasis of his argument is that all the pilots were, in reality, a single unit in which they moved up, from the business fleet to production and delivery and, ultimately, to engineering testing.

D. *The Question of an Equivalent Position*

The Board's remedial order requires that Mourning be offered reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position.

Mourning's former job in the business fleet was available, and he should have been reinstated in that job, as of the date of his discharge on November 15, 1968. However, as discussed above, Mourning's former position has not existed since June 9, 1970. The General Counsel and Mourning argue that an equivalent position has existed since that date and the backpay specification incorporates a 10-percent raise for Mourning effective January 1, 1971, on the assumption that Mourning would have been promoted on that date to production and delivery pilot. James Middleton, a field examiner for the Board, who prepared the specification, testified:

> By taking a look, Mr. Quinn was given the title of Production/Delivery Pilot approximately three years after he came into the business fleet; Mr. Riley, approximately six-and-a-half years after; and Mr. Brush, I believe, was only a year-and-a-half.
>
> So, I really took between Quinn and Riley and put Mr. Mourning in approximately five years, five-and-a-quarter years after he came into the fleet. Not quite an average, but in between the two of them.
>
> Q. In your discussions with Mr. Adler and other people from the Company, as well as your own experience, did you learn what the difference was between the business fleet and the Production/-Delivery Pilot?
>
> . . . .
>
> A. Well, as I understand it, the Production and Delivery Pilots were flying DC-9's, were just that – either – I assume that production is production task, although I was never actually told that and also for delivery to the various customers. Whereas, the business pilot was flying a smaller aircraft, either a Cesna Twin Engine or Twin Jet Aero Commander.

By that action Mourning was promoted, for purposes of the specification, from a rank-and-file employee to a supervisor.[56] Further, their action assumes that Mourning's former job was in existence at all times until January 1, 1971. Aside from any argument about whether or not the Board has authority to create a supervisor for Respondent, [57] Middleton acknowledged that he did not really understand the difference between a business fleet pilot and a production and delivery pilot, and also, he used only two pilots' promotions as a gauge to determine the date January 1, 1971, for his promotion of Mourning. The differences between pilots for the business fleet and those for production and delivery are considerable, as described above. The aircraft they fly, the duties they perform, the hours and working conditions they have,[58] and their legal status under the Act (i.e., rank-and-file employee versus supervisor), all are at considerable variance from each other.

So far as the date gauge is concerned, it was noted earlier that pilots have not been promoted to production and delivery on any schedule, or pursuant to any system of advancement. Each case has been different, since pilots have different qualifications and experience, and many considerations enter into selection for promotion. As noted, Respondent has no seniority system for purposes of promotion. Finally, and perhaps most important, a Board promotion of Mourning to DC-9 pilot, even if only for purposes of the backpay specification, would result in a determination that the Board can state when a pilot is qualified to move in command from light aircraft to heavy aircraft. Such a judgment is for Respondent, since Respondent bears the burden of the consequences of its pilot selections. The Board specifically refused to undertake such a determination, when it issued its decision in 238 NLRB 668, 672 fn. 25:

> As we have found that Mourning was not a supervisor at the time of his discharge, we also find no merit in Respondent's argument that he was a supervisor trainee and he ultimately would have become a supervisor. There is evidence in this record that Mourning was attending ground school to prepare himself to fly larger aircraft, but there is no evidence that the program was designed to train pilots to become supervisors. Furthermore, before Mourning could expect assignment as a pilot-in-command on larger aircraft such assignment was contingent on his demonstrating his qualifications therefor. Under the circumstances of this case it

[56] *Douglas Aircraft Co.*, 238 NLRB 668 (1978).

[57] Respondent argues that the Board has no such authority, relying primarily on *Ford Motor Co.*, 251 NLRB 413 (1980), enf. denied *NLRB v. Ford Motor Co.*, 683 F.2d 156 (6th Cir. 1982).

[58] Production and delivery pilots at times are required to be on travel status, sometimes as much as several months. Mourning testified that, at least since approximately 1972, "I can't be away from my son [note: the son is mentally retarded] to a lengthy extent. I've got to be home every night."

would be pure speculation whether he would have ultimately attained supervisor status.

Counsel for Mourning argues that the true issue here is not whether Mourning would have been laid off in 1970 because of changed business conditions. Rather, it is argued, the issue is whether or not Respondent would have had work available for Mourning. Counsel then contends that such work was available because one plane remained in the business fleet, and there still was business fleet work to be done. However, that argument does not take into account two basic facts. First, only one airplane was kept in the business fleet (other than a helicopter), and Respondent kept its two best qualified pilots for that airplane, both of which pilots were better qualified than Mourning. Second, on the occasions when nonbusiness fleet pilots temporarily flew the business fleet Jet Commander, those pilots permanently were assigned to production and delivery or engineering testing, in neither of which capacities was Mourning qualified or rated.

Akin to this argument is the contention of the General Counsel and Mourning that Respondent should have offered Mourning a job at McDonnell Aircraft Company in St. Louis. That argument is without merit. At no time during the long history of this case has there been a contention that any unit group of employees, or job, was involved other than at Douglas' plant in Long Beach. The two facilities were merged primarily because of financial difficulties related to production problems, and both have retained their corporate autonomy since the merger. Management and personnel have kept their separate identities, and there has been no interchange of employees at any level, managerial, supervisorial, or rank-and-file. In any event, Douglas' business fleet counterpart in St. Louis had only transport pilots with crews consisting of a copilot, a navigator, and a flight engineer, and those pilots are statutory supervisors.[59] As found herein, Mourning would not have been, as of June 9, 1970, rated or qualified for those positions, even assuming such a position was available, which is not shown. It is recognized that *McDonnell* was decided December 1, 1973, but there is nothing in the record to show that the pilot structure then was any different from what it was in 1970.

Motion for Attorney's Fees

At trial, and by undated document filed herein, Mourning's attorney moved for award of attorney's fees, on the basis that "The Company in this case has no just cause to complain about being held responsible for these fees since it deliberately chose to force Mourning through these legal proceedings, and then burdened those proceedings with the exhaustion of every defense the ingenuity of its counsel could devise."

Much of the argument in support of counsel's motion is addressed to the period of time prior to adjudication of the merits of the case, which occurred on September 29, 1978. Counsel complains about delay prior to that date, and argues that, since the original wrong of illegally discharging Mourning was Respondent's and since Respondent caused the delay by its "recalcitrance and persistence," Respondent should pay the attorney's fee.

As counsel points out, the Board customarily does not award attorneys' fees to successful litigants, but does make such awards in appropriate cases. Such cases include those wherein the Board sought to discourage "frivolous litigation[60] and wherein a respondent has been dedicated to outright rejection of the Act, shown by repeated and flagrant denial of employee rights, intransigence, and the flouting of Board and court rules. [61] However, awards have been denied in cases wherein a respondent's unfair labor practices simply are "aggravated."[62]

Temporarily setting aside for purpose of discussion, the period from November 15, 1968 (date of Mourning's discharge), to January 14, 1975 (date of remand by the Board to the Regional Director of 202 NLRB 304, supra), this case has followed a routing path that is well known to litigants, the Board, and the courts. The matter was heard by Administrative Law Judge Boyce on March 18–20, 1975, and his decision was issued May 6, 1975. On December 16, 1975, the Board adopted Administrative Law Judge Boyce's decision to dismiss the complaint in its entirety. The Board's decision was appealed, as noted above, and was remanded by the court to the Board for further proceedings. On September 29, 1978, the Board reversed its position and ordered Mourning reinstated with backpay. That order was enforced by the Ninth Circuit on March 12, 1981. The backpay specification was issued November 4, 1982, and a backpay hearing was held in April and May 1983. That history, in and of itself, is not remarkable in any sense. There was some procedural maneuvering, as outlined in the "Statement of the Case," above, but there is no indication that Respondent acted frivolously, improperly, or in rejection of the Act. To the contrary, much of the time involved in this period was consumed as a result of the Board's agreement with Administrative Law Judge Boyce that Mourning was a supervisor, with which conclusion the Court of Appeals for the District of Columbia disagreed. Nor is there any evidence that, during this period, Respondent acted in an "aggravated" manner so far as any unfair labor practice is concerned.

Clearly, an award of attorney's fees for the period discussed above is not appropriate.[63]

As noted, counsel seems particularly concerned with events between November 15, 1968, and January 14, 1975. Mourning filed an unfair labor practice charge with the Board on May 9, 1969. Thereafter, as summarized in Statement of the Case, supra, the Regional Director refused to issue a complaint (August 7, 1969); there was a series of letter exchanges between Mourning and the Office of Appeals; the latter office closed the case (June 5, 1970); the case later was reopened; and on November 16, 1972, the Regional Director issued a com-

[59] *McDonnell Aircraft Co.*, 207 NLRB 684, 685 (1973).

[60] *Electrical Workers IUE (Tiidee Products) v. NLRB*, 426 F.2d 1234 (1970), cert. denied 400 U.S. 950 (1970).

[61] *J. P. Stevens & Co.*, 244 NLRB 407 (1979), 668 F.2d 767 (4th Cir. 1982).

[62] *Heck's, Inc.*, 191 NLRB 886 (1971).

[63] *Heck's, Inc.*, supra.

plaint. So far as the record shows, during the period November 15, 1968, to November 16, 1972, Douglas was not a party to any proceeding involving Mourning. The argument was among Mourning, the Regional Director, and the Director of the Office of Appeals. Douglas was not directly involved in any legal proceeding until it received a copy of the complaint, which it timely answered on November 21, 1972. Thereafter, Douglas moved to dismiss the complaint (November 22, 1972); the motion ws denied by the Associate Chief Administrative Law Judge (November 30, 1972), but was granted on appeal to the Board (March 8, 1973); the Board was reversed by the Court of Appeals for the District of Columbia (October 17, 1974); and the matter was referred to Administrative Law Judge Boyce, who tried it March 18–20, 1975. Of this entire period of time, approximately 6-1/2 years, Douglas was involved for only approximately 2-1/2 years (other than the discharge itself). During that 2-1/2 years Douglas did not, so far as the record shows, do anything other than defend itself, as it was entitled to do under the Act. There is no showing that Douglas acted frivolously, arbitrarily, or in defiance of the Act or the Board. Mourning prevailed in his claim on September 29, 1978, but in the meantime, and particularly during the period under discussion, it could not be assumed that Douglas violated the Act. To the contrary, the Board agreed with Douglas' contentions on two separate occasions. This period shows no unconscionable delay, or misconduct, on the part of Respondent. Whether or not counsel feels aggrieved by any action, or failure to act, on the part of the Board or the Office of Appeals, is irrelevant so far as counsel's motion for attorney's fees to be paid by Douglas is concerned. There is no basis for finding that Douglas' actions within this period were appropriate for award of a fee, as requested.

Counsel's motion for attorney's fees is denied.

The Backpay Period and Earnings

Based on the record, including the pleadings, stipulations of counsel, and testimony, it is found:

(a) Mourning's backpay period commenced November 15, 1968, and ended June 9, 1970.

(b) During his backpay period Mourning had net earnings as set forth in the General Counsel's specification.

(c) Mourning is entitled to backpay in the sum of $13,310.19, less applicable withholdings required by law, plus payment of Mourning's benefits under Respondent's savings and retirement plans, in the sums to be determined by the Regional Director as being due and owing pursuant to the terms of the two plans.

ORDER

On the basis of the foregoing findings and conclusions, it is ordered that McDonnell Douglas Corporation pay to Robert H. Mourning the sum of $13,310.19, plus the amount to be computed by the Regional Director as due and owing to Mourning under Respondent's savings and retirement plans for the period November 15, 1968, to June 9, 1970, with interest on all amounts to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977), less tax withholdings required by Federal and state laws.